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No. 06-5754

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2005

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari To

The United States Court of Appeals

For the Fourth Circuit

REPLY TO THE RESPONDENT'S MEMORANDUM IN OPPOSITION

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ARGUMENT

The Government's one-paragraph response to the Petitioner's original petition does not actually brief its opposition to the granting of certiorari, but rather refers the Court and the Petitioner to the reasons it set forth in briefs it filed in other cases. Thus, as directed, the Petitioner addresses the proxy arguments raised and fully briefed in Guzman-Balbuena v. United States, No. 05-10634, 2006 WL 2089475 (filed June 29, 2006), as cited in the Government's response.[1]

In Guzman-Balbuena, the Government argued that the issue is not appropriate for review because the Fourth Circuit did not apply a presumption of reasonableness in affirming that petitioner's sentence. However, in the instant case the Fourth Circuit did explicitly state "a sentence imposed within the properly calculated Guidelines range is . . . presumptively reasonable." United States v. Rita, No. 05-4674, 2006 WL 1144508 at *1 (4th Cir. May 1, 2006) (per curiam) (unpublished) (citing United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006) (ellipsis in original)).

Also, in its Guzman-Balbuena response, the Government cites to cases where some circuit courts of appeals that have held that a sentence within the guideline range is presumptively reasonable

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[1]Petitioner notes that although the briefs cited by the Government have Westlaw citations, the contract that the Federal Public Defenders Office has with Westlaw does not allow access to that type of material, nor are they available on the Supreme Court's webpage. Thus, with the filing deadline in mind, counsel for Petitioner had to obtain a copy of the Government's brief directly from the Federal Public Defender's Office for the Eastern District of Virginia. The Government might consider in the future attaching a copy of the cited briefs to its memorandum for the convenience of the Court and opposing counsel.

because the Guidelines incorporate the sentencing objectives found in 18 U.S.C. § 3553(a). However, that rationale is simply incorrect. As illustrated below, the guidelines do not incorporate all the sentencing objectives found in § 3553(a). In addition, rules of statutory construction cut against such an interpretation because had Congress believed that the guidelines would incorporate all the factors in § 3553(a), the listing of those factors would be redundant and meaningless when read in conjunction with §§ 3553(a)(4)and (5), which instruct the court to also consider the guidelines when fashioning the appropriate sentence.

As noted above, section 3553(a) sets forth many factors other than the guidelines for determining "a sentence sufficient, but not greater than necessary, to comply with the purposes [of § 3553(a)]." 18 U.S.C. § 3553(a).

The applicable factors are:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) The need for the sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a).

Often, a defendant can present evidence relating to a factor that is discouraged or forbidden under the guidelines, but is related to one of the above considerations. For instance, the guidelines *forbid* a court from downwardly departing based on a drug or alcohol dependence or abuse or a gambling addiction (§ 5K1.4), race, sex, national origin, religion, and socio-economic status (§ 5H1.10), lack of guidance as a youth and disadvantaged upbringing (§ 5H1.12), economic hardship (§ 5K2.12), and post-sentencing rehabilitative efforts (§ 5K2.19). Yet, individual circumstances often present instances where such forbidden factors are relevant to sentencing considerations set forth in § 3553(a).

In addition, the guidelines *discourage* courts from considering the defendant's age (§ 5H1.1), education and vocational skills (§ 5H1.2), mental and emotional conditions (§ 5H1.3), physical condition or appearance, including physique (§ 5H1.4) employment record (§ 5H1.5), family ties and responsibilities and community ties (§ 5H1.6), and military, civic, charitable, and public service, including employment-related contributions and prior good works (§ 5H1.11). Many of these forbidden or discouraged factors are ones judges traditionally considered when sentencing a defendant and are not sufficiently taken into account by a "presumptive" guideline range. Thus, the guideline range should not be considered presumptive and allowed to trump the other equally important objectives set forth in § 3553(a).

The Government rejects the Petitioner's argument that making the Guidelines presumptively reasonable leads to an

unconstitutional result. Yet, the Fourth Circuit's post-Booker, law has done just that. Although United States v. Booker, 125 S. Ct. 738 (2005), mandates that the court first calculate the proper guideline range pursuant to existing guideline law and then consider that range, as well as the other factors in 18 U.S.C. § 3553(a), in determining a reasonable sentence, id. at 764, the Fourth Circuit takes it two steps further.

First, as noted above, the Fourth Circuit has held that a sentence within the advisory guideline range is presumptively reasonable. See United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006). By making the guideline range presumptively reasonable, the court places more weight on that factor than any other factor in § 3553(a). Yet, the plain language of § 3553(a) does not support placing a greater weight on the guidelines than any other factor mandated by the statute.

Furthermore, as pointed out by Justice Scalia, section 3553(a) "provides no order of priority among all those factors . . . [and] the statute . . . authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members who drew up the Guidelines." Booker, 543 U.S. at 304-05 (Scalia, J., dissenting). "The remedial majority also notes that the Guidelines represent what the Sentencing Commission finds to be better sentencing practices.' True enough, but the Commission's view of what is 'better' is no longer authoritative, and district

judges are free to disagree - as are appellate judges." Id. at 306 n.3 (Scalia, J., dissenting).

Second, the Fourth Circuit stated in United States v. Moreland, 437 F.3d 424 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006), "when the variance[2] is a substantial one, . . . we must more carefully scrutinize the reasoning offered by the district court in support of the sentence. The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." Id. at 434. In Booker, Justice Scalia notes that "any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional." 125 S. Ct. at 794 (Scalia, J., dissenting). Justice Scalia further advises courts to "[b]ear in mind that one of the most significant features of the remedial majority's scheme of 'unreasonableness' review is that it requires courts of appeals to evaluate each sentence *individually* for reasonableness, rather than apply the cookie-cutter standards of the mandatory Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand)." Id. (emphasis in original). Yet, as seen in Green, that is precisely the Fourth Circuit's practice.

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[2]The Fourth Circuit refers to any sentence not within the advisory guideline range as a "variance sentence." Moreland, 437 F.3d at 432. A variance sentence under Moreland, one could argue, is simply a new term for a departure from the guidelines range.

The Fourth Circuit vacates and remands any sentence outside the guideline range that is, in its opinion, inadequately explained. As illustrated in Petitioner's petition for certiorari, that is nearly every single case. Such a practice sends a message to the district courts that they are to sentence within the guideline range.

The standard of review in the Fourth Circuit goes far beyond what is required by Booker. As pointed out by Justice Scalia, "If [the remedial majority] thought that the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed - its opinion would surely say so." 543 U.S. at 305-06 (Scalia, J., dissenting). The Fourth Circuit's justification requirements for sentencing outside the guideline range likens to the standard for departures under the guidelines, which were available before Booker, but which Booker did not find sufficient to save the guidelines from being unconstitutionally applied. See 543 U.S. at 234. Such a system is not "advisory," it is *de facto* mandatory and a simply a return to pre-Booker law.

Chief Judge Merritt of the Sixth Circuit drafted a compelling dissent in United States v. Miller, 910 F.2d 1321, 1330 (6th Cir. 1990), which reflects the Petitioner's constitutional concerns. In Miller, the defendant was charged with and pleaded guilty to conspiring to distribute 1.25 ounces (35.5 grams) of cocaine hydrochloride, yet, he was sentenced for 1,169.5 grams of cocaine. Id. at 1323. Chief Judge Merritt's dissent called attention to the problems in sentencing for unindicted relevant conduct.

Chief Judge Merritt found that process unconstitutional, noting that pursuant to the Fifth and Sixth Amendments, the accused is entitled to "'be informed of the nature and cause of the accusation,' be accorded the right of trial by jury and the rights of confrontation and compulsory process." Id. at 1330 (Merritt, C.J., dissenting). Further, while that defendant waived "some of these important constitutional protections as to the lone count against him, he did not validly waive those rights as to all crimes for which the government might at some time indict him." Id. "[B]y aggregating unindicted, unconvicted crimes with the one crime for which the defendant *was* convicted, the sentence also violates fundamental principles of due process." Id. at 1329 (Merritt, C.J., dissenting).

Chief Judge Merritt points out the heavy emphasis the constitution puts on the right to fair notice of the charges. He states:

> This requirement appears not once, but twice. The Fifth Amendment provides for fair notice by "presentment or indictment." The Sixth Amendment similarly requires that a defendant "be informed of the nature and cause of the accusation." This repetition of the right indicates the significance that the Founders attached to the right to receive fair notice of the crime that a defendant must defend against.

Id. at 1331 (Merritt, C.J., dissenting). Chief Judge Merritt concluded that "[t]he defendant was misled by the charge and the course of the proceedings into believing that his crime was of a smaller magnitude than the Sentencing Guidelines mandate." Id.

As he aptly noted,

> An indictment merely opens the game of defining the crime, which will be played out later in the probation office and the sentencing hearing. The real charge for which the defendant will be sentenced will be drawn up in the probation office, and the sentence will be imposed without the right of confrontation at the sentencing hearing by the court on the basis of hearsay information. Instead of an indictment including all lesser included offenses of the crime charged, the Guidelines say that the sentencing court should include all "greater included offenses" as well.

Id. at 1331-32 (Merritt, C.J., dissenting) (emphasis added). Chief Judge Merritt concluded that "[t]he Guidelines obviously invite the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office." Id. at 1332.

Likewise, in United States v. Wilson, 992 F.2d 156 (8th Cir. 1993), the Eighth Circuit addressed a case where a defendant was charged with being a felon in possession and possessing a firearm unregistered to him but was sentenced pursuant to a cross-reference to the assault with intent to commit murder and attempted murder guideline. Senior Circuit Judge Heaney, joined by Senior Circuit Judge Bright, acknowledged in a concurring opinion that based on the law at that time, they were forced to apply the cross-reference. However, in his concurrence, Senior Circuit Judge Heaney stated:

> My dispute is not over whether a preponderance of the evidence supported a finding of attempted first-degree murder, but whether we, or any federal court, should be making any finding in this regard. The attempted murder alleged in this case is not a federal offense. This is not simply a case in which a federal prosecutor chose not to charge an offense, or the offense was charged and the offender acquitted, and then the prosecutor took a second bite of the apple by introducing conduct as relevant to sentencing. Rather, the prosecutor could not even have charged Wilson with the alleged attempted murder. The proper place for this charge is in state court, where

> Wilson would have the right to a jury trial, to confront witnesses, and to have the necessary findings made beyond a reasonable doubt.

Id. at 159 (Heaney, concurring) (emphasis added).

Although Chief Judge Merritt and Senior Circuit Judges Heaney and Bright expressed these opinions prior to the holding in Booker, Booker does not completely address their objections. Merely making the guideline range advisory, yet presumptively reasonable, still allows the Government to circumvent due process procedures by holding a mini-trial on more serious, but uncharged, crimes in a sentencing hearing. If a court finds by a preponderance based on hearsay evidence that a more serious uncharged crime occurred, that court *must* then consider the guideline range for the more serious crime. For that range to be "presumptively reasonable" taints the process to the point that merely saying that it is "advisory" does not save it from being unconstitutional as applied. In other words, a process that advises a court to impose an unconstitutional sentence is an unconstitutional process.

Most recently, Justice Ginsburg indicated how she would rule on presumptive guidelines in a new guise: "In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments." Washington v. Recuenco, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting).

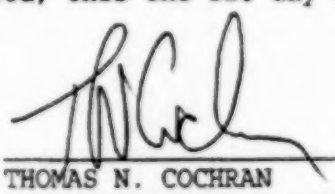
Finally, Petitioner asks that a decision by this Court be held pending the disposition of Cunningham v. California, No. 05-6551,

(cert. granted Feb. 21, 2006). The issue in that case mirrors the issue in the instant case. The issue presented in Cunningham is whether California's presumptive sentencing system violates the Sixth and Fourteenth Amendments. Under the California system, the punishment for Cunningham's offense was 6, 12, or 16 years' imprisonment, with the middle term required absent aggravating or mitigating facts that could be found by the court by a preponderance. Notably, in its Brief in Opposition before the California Supreme Court, the State of California argued that its system did not violate Blakely because it is indistinguishable from the post-Booker federal sentencing system, in that the presumptive middle term is functionally equivalent to the "reasonableness constraint" placed on federal courts by Booker. Brief in Opposition of the State of California at 8-9, 10, 2005 WL 3783460 (filed Dec. 12, 2005). Presumably, the State will present the same argument before this Court. Thus, this case should be held pending the outcome of Cunningham.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

Respectfully submitted, this the 1st day of September, 2006.



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CERTIFICATE OF SERVICE

I, Thomas N. Cochran, certify that as counsel of record for Petitioner, I have served an original and ten (10) copies of the Petitioner's Reply to the Respondent's Brief in Opposition in the above-entitled case by Overnight delivery to:

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, NE
Washington, DC 20543

and by U. S. Mail to all others required to be served

This, the 1st day of September, 2006.

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